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October Term, 1955

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

TRUST MANUFACTURING COMPANY,

PETITION FOR A WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

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In the Supreme Court of the United States.

OCTOBER TERM, 1955

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUITT MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on July 30, 1955, denying the Board's petition for enforcement of its order against Truitt Manufacturing Company.

OPINIONS BELOW

The opinion of the court below (App. A, *infra*, pp. 14-27) is reported at 224 F. 2d 869. The findings of fact, conclusions of law, and order of the Board (B.A. 27-57, 63-67)¹ are reported at 110 NLRB 856.

¹ References designated "B.A." are to the appendix to the Board's brief filed in the court below.

JURISDICTION

The judgment of the court below was entered on July 30, 1955 (App. A, pp. 27-28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer who, in the course of collective bargaining negotiations, claims inability to pay a requested wage increase must, in order to fulfill the bargaining requirement imposed on him by Section 8(a)(5) of the Act, furnish the union upon its request with the financial data upon which the claim is based.

STATUTE INVOLVED

The statutory provision principally involved, Section 8(a)(5) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), appears in Appendix B, *infra* pp. 28-29.

STATEMENT

1. *The facts.*—In the summer of 1953, Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A.F.L., hereafter called the Union, invoked the reopening provision of its existing contract with Truitt in order to begin negotiations with respect to a wage increase (B.A. 30:1). The parties first met on August 4, and the union representatives requested that wages be raised a minimum of 10¢ an hour (B.A. 30:8). Truitt's representatives refused to agree to more than a 2½¢

increase, stating "that would be all that [they] would be able to give at this time . . . that if they would give more . . . it would put them out of business or put them out of competition of getting business with other competitors" (B.A. 49; 8, 9). The president of Truitt, who attended the meeting, added that "the Company had never paid dividends, [was] undercapitalized, . . . didn't have working capital, and to grant more than the $2\frac{1}{2}\text{¢}$ at this time would simply put [it] out of business" (B.A. 50; 16). No agreement was reached, and the meeting ended.

On August 7 the parties met again. The Union reported that the employees had rejected the proposed $2\frac{1}{2}\text{¢}$ increase, but Truitt refused to increase the offer (B.A. 34; 9). No further headway was made, and as a result of the impasse the Union conducted a strike, from August 10 to 17, in support of its wage demand (*ibid.*). Immediately following the strike Truitt put into effect the $2\frac{1}{2}\text{¢}$ increase it had offered (B.A. 14). On September 2, 1953, the Union wrote Truitt that it still held the "belief [that] your Company can meet the Union's request of ten cents (10¢) per hour general increase" (B.A. 2). The letter further stated (*ibid.*):

Representatives for the * * * Company have claimed, during our lengthy negotiations, the inability to grant an increase in excess of two and one-half ($2\frac{1}{2}\text{¢}$) cents per hour, therefore, Shopmen's Local Union No. 729 respectfully

requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal. . . .

Truitt wrote in reply that it took "the position that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union" (B.A. 3). It also reiterated that its refusal to grant the requested increase was based on its fear that it could not obtain work contracts "if our labor costs used in our estimates are higher than those of our competitors" (*ibid.*).

The foregoing letters were followed by another exchange of correspondence between the parties in which each elaborated its position. Thus, in a letter to Truitt dated September 14, 1953, the Union wrote (B.A. 5-6):

The Union does not contend that the financial affairs of the Company are subject to collective bargaining. It does contend, however, that the Company should submit full and complete information with respect to its financial standing and profits during the past few years in order that the Committee as well as other members of the Union employed by the Company, can intelligently decide whether or not they should continue to press their request for a general increase of ten cents (10¢) per hour. Such financial information is per-

tinent to collective bargaining. Failure on the part of the Company to furnish such information has the effect of erecting an insurmountable barrier to a successful conclusion of the bargaining.

* * * * *

If the Company still contends that it cannot afford to grant the wage increase of ten cents (10¢) per hour requested by the Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including bona fide evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs.

In its reply Truitt restated its position "that the financial status of the company and the information which you have requested . . . is not pertinent to this discussion and the company declines to give you such information; you have no legal right to such" (B.A. 7).

One further meeting between the parties was held in the fall of 1953, at which time Truitt persuaded the Union to postpone further negotiations until the first of the following year in order to permit the Company to determine whether it would realize overhead savings from new operating procedures which it had effected (B. A. 40-41; 10-11). As a result, the parties met on three final occasions

in January and February of 1954, but no agreement was reached. Truitt offered an additional but provisional 2½¢ increase, which it shortly thereafter withdrew, claiming that because of "competitive business" it "just couldn't afford" more than it had already granted. (B. A. 42; 13, 26). The Union continued to urge the full 10¢ increase, and renewed its request for "proof if the Company was not making money . . . proof to substantiate that claim" (B. A. 42-43; 12). By such proof, the Union stated, it meant "any records or what have you, books, accounting sheets, cost expenditures, what not, anything to back the Company's position that they were unable to give more money" (B. A. 45, 46; 14-16). Truitt's representatives, however, continued to refuse the request on the ground that such records were "none of [the Union's] business" (B. A. 16).

2. *The Board's decision.*—Upon the foregoing facts the Board concluded (B.A. 63-64) that Truitt had sought "to justify the refusal of a wage increase upon an economic basis," and that the Union was therefore entitled, in accordance with the good faith bargaining requirement of the Act, to be furnished with the data upon which the Company purported to rest its claim. In support of its decision the Board cited *National Labor Relations Board v. Jacobs Mfg. Co.* 196 F. 2d 680, where the Court of Appeals for the Second Circuit enforced an order of the Board which, as in the present case, required an employer, who refused a wage increase on the claim that he could not afford it, to

supply the Union, upon the latter's request, with "such statistical and other information as will substantiate the [Company's] position of its economic failure to pay the requested wage increase" (B.A. 64-65; see 196 F. 2d at 684).

3. *The decision of the court of appeals.*—The court below denied enforcement of the Board's order. In its view, the financial data which induces an employer to decide that he cannot afford a wage increase "relates to matters altogether in the province of management, which [are] not the proper subject of bargaining" (*infra*, p. 25). The court further observed that "if the position of the Board here is sustained, it will result that every employer who resists a wage increase on economic grounds must make the concession of opening up his books and disclosing to the union not only his general financial condition, but such highly confidential matters as manufacturing costs" (p. 24; *infra*). Accordingly, the court below concluded that the Company in this case "may not be guilty of an unfair labor practice because of refusal to furnish such information to the union" (*infra*, p. 15).

The opinion of the court suggests that the decision of the Second Circuit in the *Jacobs* case, *supra*, p. 6, discussed more fully *infra*, pp. 8-9, might be distinguished from the holding in the instant case on the ground that the employer in *Jacobs*, unlike the employer here, refused to discuss any of the subjects which under the existing contract were appropriate for bargaining. The

opinion adds, however, that "If other language in the opinion [in *Jacobs*] seems to support the position here taken by the Board, we cannot accept it as a correct statement of the law" (*infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Court of Appeals for the Second Circuit in the *Jacobs* case, *supra*. In that case the Board found that the employer had violated Section 8(a)(5) of the Act in two separate respects: (1) it had refused to discuss pension plans with the Union and (2) like the employer in this case, it had refused the union's request that it "furnish the union with any information to support its position that it was financially unable to grant the requested wage increases." 196 F. 2d at 682-683. The Second Circuit treated the two findings of violations independently of each other, and affirmed both. With respect to the refusal of the employer to grant the union the financial data it requested, the Second Circuit, contrary to the views of the court below, reasoned that the Act's bargaining requirement "was not satisfied . . . by the bare assertion of a conclusion made upon facts undisclosed and unavailable to the union which was not acceptable without a presentation of sufficient underlying facts to show, at least, that the conclusion was reached in good faith." *Id.*, at 683. The court in the *Jacobs* case therefore concluded, in contrast with the holding of the court below upon indistinguishable findings of fact, that

the employer had committed an unfair labor practice "when it refused to disclose pertinent facts to show that it had, in good faith, reached its decision that it could not afford to meet the union demands." *Id.*, at 684.

The suggestion in the opinion of the court below that the *Jacobs* case might be distinguished on the ground that "the unfair labor practice there consisted in the refusal to bargain at all" (p. 26, *infra*), while in this case the employer entered into contract negotiations with the Union, is we submit, erroneous. The company had sought to justify its refusal to confer on the ground that it had done everything that could be reasonably expected. Thus, the reasonableness of refusing further meetings turned on the same issue as is involved in this case, namely, whether the company was under a duty to disclose the underlying facts on which it based its assertions of inability to meet the wage demands. Moreover, for a second reason the suggested distinction cannot withstand analysis, for it would attribute validity to an order which purports to remedy an employer's refusal to bargain by requiring him to supply information to the union which, if the court below is correct, the Act itself does not require to be furnished. The assumption, upon which the distinction thus rests, that the Board might properly issue such an order, is plainly incorrect. Cf. *Republic Steel Corporation v. National Labor Relations Board*, 311 U.S. 7; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 235-236.

2. Resolution of the question whether the Act entitles a bargaining representative in the course of negotiations to the financial data, upon which an employer bases a claim of inability to pay a requested wage increase, is of manifest practical importance in normal collective bargaining relationships, and, accordingly, is the administration of the Act. It is common knowledge that wage demands constitute one of the most frequent issues that arise in bargaining. Indeed, disagreement over wages was an issue in nearly three-fourths of the strikes that occurred in 1954, a figure which corresponds closely with the experience of the last decade.² Whenever, in these situations the employer's refusal to accede to the union's demand is attributable to a claim of inability to pay, the question raised here is at least potentially present. A clear understanding by the parties of their rights and duties with respect to this important and recurring bargaining issue is essential to a proper working of the collective bargaining process which the Act seeks to foster.

3. The decision of the court below constitutes, in the Board's view, a serious departure from the principle, which is a recognized corollary to the Act's bargaining requirement, that where the relevant facts are "peculiarly within its knowledge" an employer is "obliged to furnish the Union with sufficient information to enable the latter to understand and discuss intelligently the issues

² Monthly Labor Review, Vol. 78, No. 5, pp. 540-541 (Bur. of Lab. Stat., Dept. of Labor, 1955).

raised by the [employer] in opposition to the Union's demands." *Southern Saddle Co.*, 90 NLRB 1205, 1207. This principle has uniformly been applied by the courts to require employers to furnish unions, for their use in negotiations, employee wage and job classification data,³ seniority information,⁴ and time study data.⁵ It is no less applicable in the situation here, for an employer who rejects a wage increase on the basis of financial data unavailable to the union thereby shuts off further bargaining on the matter. *Jacobs case, supra*. Lacking access to the controlling facts, the union is not in a position to know whether its demands are excessive, and whether the employer's position is taken in good faith; it is deprived of all basis for intelligent discussion. Its only recourse to settle the issue is either to withdraw its demands or to strike, a result which cannot be squared with the statutory concept that wages should be fixed,

³ See, e.g., *Boston Herald-Traveler Corp. v. National Labor Relations Board*, 223 F. 2d 58 (C.A. 1); *National Labor Relations Board v. Yawman & Erbe*, 187 F. 2d 947, 948-949 (C.A. 2); *National Labor Relations Board v. Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied 349 U.S. 905; *National Labor Relations Board v. The Item Company*, 220 F. 2d 956 (C.A. 5), certiorari denied, October 10, 1955, No. 216, this Term; *National Labor Relations Board v. Hekman Furniture Co.*, 207 F. 2d 561 (C.A. 6); *Aluminum Ore v. National Labor Relations Board*, 131 F. 2d 485, 487 (C.A. 7).

⁴ *National Labor Relations Board v. New Britain Machine Co.*, 210 F. 2d 61 (C.A. 2); *Singer Mfg. Co. v. National Labor Relations Board*, 119 F. 2d 131 (C.A. 7), certiorari denied, 313 U.S. 595.

⁵ *National Labor Relations Board v. Otis Elevator Co.*, 208 F. 2d 176 (C.A. 2).

if possible, by joint participation of employer and union through the process of collective bargaining.

Upholding a provision in a Board order similar to that stricken here, the Second Circuit stated in the *Jacobs* case (196 F. 2d at p. 684):

To bargain collectively in compliance with the statute does not mean that an employer must produce proof to establish that he is right in his business decision as to what he can, or cannot, afford to do. He is left free to decide that himself and, at the end of the bargaining, may agree only insofar as he is willing in the light of all the circumstances. See § 8(d). The Board's order does not require the respondent to produce any specific business books and records but information to "substantiate" its position in "bargaining with the Union." As we interpret this, the requirement of disclosure will be met if the respondent produces whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands.

The observation of the court below that disclosure of "such confidential matters as manufacturing costs . . . could conceivably be used to [an employer's] great damage" (p. 24, *infra*), is not germane to decision in this case. Truitt's refusal to supply the Union the requested information was not predicated on the claim that its divulgence would be harmful, nor was any showing to that effect made before the Board. Accordingly,

the Board had no occasion to pass on the question which such a showing would have presented, and the issue was not properly before the court. Moreover, the opinion of the court below is not limited to situations where the information requested could not be supplied without harming the employer's competitive position. Thus, the court broadly rejects the Board's reasoning, holds that the financial data involved, by its nature, "relates to matters altogether in the province of management," and states, without reference to the effect of the disclosure on the employer, that "the Board was wrong in holding that good faith bargaining under the Act requires that an employer substantiate its economic position . . ." (p. 25, 18, *infra*).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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OCTOBER, 1955.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6989

NATIONAL LABOR RELATIONS BOARD, PETITIONER
versus

TRUITT MANUFACTURING COMPANY, RESPONDENT

On Petition for enforcement of an Order of The
National Labor Relations Board

(Argued June 15, 1955. Decided July 30, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE,
Circuit Judges.

PARKER, Chief Judge:

This is a petition to enforce an order of the National Labor Relations Board which found the Truitt Manufacturing Company guilty of an unfair labor practice in refusing to bargain with a union representing its employees in that, although bargaining with respect to all matters as to which it was asked to bargain, the company refused a request of the union that it allow an accountant to examine its books and records for the purpose of ascertaining whether it was financially able to grant the wage increase demanded by the union. The Board held that because the company had represented in the course of bargaining negotiations that it was not able to pay the wage increase demanded, a refusal to comply with the request of the union amounted to a refusal to bargain in good faith. The company contends that it bargained

in good faith, and that it was not required to disclose to the union, as an incident of such bargaining the books and records showing its financial condition and involving confidential matters such as manufacturing cost which it would be harmful to its business to make public. We think that the position of the company is correct and that it may not be held guilty of an unfair labor practice because of refusal to furnish such information to the union or to allow its books and records to be examined at the union's request.

The facts are that the company had duly recognized the union as the bargaining representative of its employees and had been bargaining with it for a period of three years. In the summer of 1953, the union made demand for a 10 cents per hour increase in wages and representatives of the union and the company met and negotiated with respect to the matter. The company offered a $2\frac{1}{2}$ cents per hour increase and the union called a strike which lasted for a week. After the strike was ended the union renewed its demand for the 10 cents increase, and the company again refused to accede to the demand but granted a $2\frac{1}{2}$ cents raise, which was put into effect. During the course of these negotiations, the company made statements on a number of occasions to the effect that it could not afford a 10 cents increase, that it was paying wages as high or higher than competitors and that it had lost contracts to lower bidders because of bids based on the wages that it was paying. The union asked to see its books and records in substantiation of

these statements. The company offered to produce all records relating to bids and wages paid but refused to permit examination of its books and records with respect to other matters. The letters of the union making the first demand was a letter of September 2, 1953, which contained the following paragraph:

"Representatives for the Truitt Mfg. Company have claimed, during our lengthy negotiations, the inability to grant an increase in excess of two and one-half (.021½c) cents per hour, therefore Shopmen's Local Union No. 729 respectfully requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal and/or counter proposals of a wage increase in excess of two and one-half (.021½c) cents per hour."

Counsel for the company in a letter of September 4, 1953, said in answer to this:

"I have been authorized to state to you that the Company takes the position that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union. The Company's position throughout the recent negotiations and in previous sessions with you and the Union, has been that the question of granting a wage increase concerns our com-

petitive bidding for jobs to keep the plant operating.

"We have endeavored to point out to you that the average wage of Truitt Manufacturing Co. is already higher than the average wage of all our competitors in this area. We have stated many, many times that in bidding for contract work, our bids must be made on the basis of what the labor will cost to perform these jobs and that we simply cannot get the work if our labor costs used in our estimates are higher than those of our competitors. The Union committee has persistently ignored our comparative rates, has made no answer to our exhibits of how we compare with our competitors, and has continued to ask for higher pay, on the grounds that the employees need it, and that we are under the general average of the 'Industry', which you apparently define as being all steel plants in the United States.

"We will be glad at any time to show you our books and records regarding the wages we pay to our employees whom you represent, although we think you have this information already."

In reply to this letter the union under date of September 14, 1953, wrote a letter repeating its demand in the following language:

"If the Company still contends that it cannot afford to grant the wage increase of ten

cents (10c) per hour requested by the Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including bonafide evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs."

It was failure to comply with these demands which the Trial Examiner and the Board held to be refusal to bargain in good faith. The basis of the conclusion by the Examiner was stated by him as follows: "An employer cannot refuse a demanded wage increase on the grounds that such increase would put him out of a competitive position, even though he were paying the prevailing area wage scale, unless he factually documents this conclusion." The Board refused to adopt this holding of the Trial Examiner but held that: "When an employer seeks to justify the refusal of a wage increase upon an economic basis, as did the Respondent herein, good faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof." The Board was, of course, clearly right in rejecting the holding of the Trial Examiner. We think it equally clear that the Board was wrong in holding that good faith bargaining under the act requires that an employer substantiate its economic position by submitting its books for examination by the union with which it is bargaining.

One of the first decisions upholding the statutory requirement of collective bargaining was the decision of this court in *Virginia Ry. Co. v. System Federation No. 40*, 4 Cir. 84 F. 2d 641, aff'd 300 U. S. 515. In upholding a mandatory injunction requiring the parties to bargain collectively under the terms of the Railway Labor Act, we said:

“We think it clear that the act of 1934 did more than express a pious hope on the part of Congress that the carriers would deal with the representatives which their employees might choose. In providing that ‘the carrier shall treat with the representative so certified [by the Mediation Board] as the representative of the craft or class for the purposes of this Act [chapter]’ (45 USCA 152 (ninth)), it created a legal right on the part of the employees to have the carrier recognize and treat with their chosen representatives for the purpose of collective bargaining and a corresponding duty on the part of the carrier to recognize and treat with such representatives, so that the purposes of the act might not be nullified by the carrier’s refusing to recognize a representative selected by its employees and certified as such by the Mediation Board. And it is no objection to this view that the parties are not bound to agree even though they may treat. The representatives of the employees, as above pointed out, have important functions to perform under the act, which they can perform only if the railroad recognizes and treats with

them as representing the employees; and while negotiation may not result in agreement, this is no reason why the carrier should arbitrarily refuse to negotiate with those whom its employees have chosen to represent them in negotiations. In collective bargaining, it may be that negotiation will not result in agreement, but it is certain that there will be no agreement without negotiation."

And we upheld the validity of the requirement, which was attacked under the Fifth Amendment, on the ground that what was required was negotiation, not agreement. With respect to this, we said:

"The act does not require of the carrier the making of any agreement. It does not interfere with the normal exercise of the the right of the carrier to select its employees or to discharge them. The requirement that the carrier recognize and treat with the chosen representatives of the employees is but an attempt to 'facilitate the amicable settlements of disputes which threaten the service of the necessary agencies of interstate transportation,' as approved by the Supreme Court in the *Railway & S. S. Clerks Case*:

"It is argued that, as the carrier may refuse to contract with the representatives of the employees, it may refuse to treat with them with a view of contracting, and that, at all events, a requirement to treat is but a vain thing if

treaty does not result in contract. As pointed out above, however, the representatives of the employees have many duties to perform under the act looking to the settlement of disputes and the avoidance of industrial conflict, other than the making of contracts; and it is important that their status be determined to the end that these duties may be properly performed, and that the carrier co-operate with them in performing such duties. We cannot see anything arbitrary or unreasonable in requiring that the carrier recognize the representatives of its employees and treat with them as such; and we do not understand on what theory the carrier can be said to be deprived of liberty or property by such requirement. It is but a reasonable regulation in aid of collective bargaining, which, as said by the Supreme Court, in the *Railway & S. S. Clerks Case*, Congress has chosen to promote as an instrument of industrial peace."

That the National Labor Relations Act did not require agreement but merely good faith bargaining was elaborated by this court with a discussion of what was meant by good faith bargaining in the latter decision of *N.L.R.B. v. Highland Park Mfg. Co.* 4 Cir. 110 F. 2d 632, 637, where we quoted with approval an opinion of Judge Sibley in the Fifth Circuit dealing with the matter. We said:

"The requirement to bargain collectively is not satisfied by mere discussion of grievances

with employees' representatives. It contemplates the making of agreements between employer and employee which will serve as a working basis for the carrying on of the relationship. The act, it is true, does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement with them, even as to matters as to which there is no disagreement, does not satisfy its provisions. 'The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining.' *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 236, 59 S. Ct. 206, 220, 83 L. Ed. 126. 'The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made.' *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332, 342, 69 S. Ct. 508, 513, 83 L. Ed. 682.

"The duty imposed by the statute was well expressed by Judge Sibley, speaking for the Circuit Court of Appeals of the 5th Circuit in *Globe Cotton Mills v. National Labor Relations Board*, 5 Cir., 103 F. 2d 91, 94, as follows:

'We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances.' "

What was implicit in these opinions was expressly set forth in the Labor Management Relations Act of 1947, section 8(d) 29 USCA 158(d) of which provides:

"(d) For the purposes of this section, to bargain collectively in the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

* * *

The statute requires good faith bargaining with respect to wages and other matters affecting the terms and conditions of employment, not with respect to matters which lie within the province of

management, such as the financial condition of the company, its manufacturing costs or the payment of dividends. And we do not think that merely because the company has objected to a proposed wage rate on the ground that it cannot afford to pay it, good faith bargaining requires it to open up its books to the union in an effort to sustain the ground that it has taken. If such were held to be the law, demand for examination of books could be used as a club to force employers to agree to an unjustified wage rate rather than disclose their financial condition with such confidential matters as manufacturing costs, which could conceivably be used to their great damage. To bargain in good faith does not mean that the bargainer must substantiate by proof statements made by him in the course of the bargaining. It means merely that he bargain with a sincere desire to reach an agreement. There can be no question but that the company here was bargaining in that spirit.

It is to be noted that the statute expressly provides that neither party is under obligation to make any "concession" in connection with the bargaining; but, if the position of the Board here is sustained, it will result that every employer who resists a wage increase on economic grounds must make the concession of opening up his books and disclosing to the union not only his general financial condition, but such highly confidential matters as manufacturing costs. We feel sure that it was never intended that the employer be required to disclose such information to its employees as an incident of collective bargaining, and we feel

equally sure that Congress never would have passed a statute which it thought could have been given such interpretation. It might be appropriate to require the furnishing of such information to a labor court with power to fix wages, but not to those who are bargaining at arm's length and who would be under no obligation to act upon the information if received.

There is nothing in our decision in *N.L.R.B. v. Whittin Machine Works*, 4 Cir. 21, F. 2d 593 which supports the order of the Board. That case had to do with furnishing information as to wages paid the employees, information which the company here offered to furnish, not with dividends, manufacturing costs or the general financial condition of the employer. The information there required to be furnished related to matters with which bargaining was properly concerned. The information here asked relates to matters altogether in the province of management, which were not the proper subject of bargaining. The decision of the Court of Appeals of the 2nd Circuit in *N.L.R.B. v. Yawman & Erbe Mfg. Co.*, 2 Cir. 187 F. 2d 947 is distinguishable on the same ground.

The Board relies particularly on the decision of the 2nd Circuit in *N.L.R.B. v. Jacobs Mfg. Co.*, 2 Cir. 196 F. 2d 680. In that case however, it appears that the employer had refused to meet and negotiate with the union, after an initial meeting at which it had stated that it could not afford a wage raise and did not consider certain other matters subject to change under the collective bar-

gaining agreement then in effect. The unfair labor practice there consisted in the refusal to bargain at all; and the order of the Board was entered to redress that practice. It is to be noted that, even as an order redressing what was unquestionably an unfair practice in refusing to bargain, it did not go so far as the demand made by the union here. The opinion in that case states that "the Board's order does not require the respondent to produce any specific books and records but information to 'substantiate' its position in 'bargaining with the union' ". The opinion seems to say that, in the absence of refusal to bargain such as was there involved, there is no obligation on the part of the employer to substantiate by its record the position it has taken, for it contains the categorical statement: "To bargain collectively in compliance with the statute does not mean that an employer must produce proof to establish that he is right in his business decision as to what he can or cannot afford to do". If other language in the opinion seems to support the position here taken by the Board, we cannot accept it as a correct statement of the law.

Our conclusion is that failure to comply with the demand to furnish to the bargaining union the information here demanded did not establish bad faith in the bargaining, in which the employer here was admittedly engaged, and that there was no basis for the Board's finding of an unfair labor practice. The petition for enforcement must ac-

cordingly be denied and the order of the Board set aside.

Enforcement Denied and Order Set Aside.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

TRUITT MANUFACTURING CO., RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Truitt Manufacturing Co. on the 15th day of November, 1954, in a proceeding before the said Board numbered 11-CA-670, entitled "Truitt Manufacturing Co. and Shopmen's Local No. 729, International Association of Bridge, Structural, and Ornamental Ironworkers of America, A.F.L."; upon the answer of the respondent; upon the transcript of the record in said proceeding; certified and filed in this court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the petition

for enforcement in this cause be, and it is hereby, denied, and that the said order of the National Labor Relations Board be, and it is hereby set aside.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ARMISTEAD M. DOBIE,
United States Circuit Judge.

Filed: JULY 30, 1955.

R. M. F. WILLIAMS, JR.,
Clerk.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of

the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *